Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	**WT Docket No. 97-81**
Regarding Multiple Address Systems	)	

To: The Commission

COMMENTS OF ADAPTIVE BROADBAND CORPORATION

On behalf of Adaptive Broadband Corporation, formerly Microwave Data Systems, Inc., Keller and Heckman LLP files these comments in response to the Further Notice of Proposed Rule Making and Order ("Further Notice"), released by the Commission on July 1, 1999.

Background

Adaptive Broadband is a leading manufacturer and vendor of MAS equipment to the nation's public safety and critical infrastructure companies. Adaptive Broadband has been an active participant in this proceeding for many years. Most recently, in a Statement filed in this proceeding on July 29, 1999, Adaptive Broadband urged the Commission to lift its ill-considered freeze on acceptance of applications for licenses in 928/952/956 MHz bands. We take this opportunity to again urge the Commission to lift the freeze. As fully developed below, the Commission's tentative conclusions and proposals in this proceeding are seriously flawed and cannot support the proposed final outcome. The drastic interim measure of a freeze on applications is equally unsupported.

Despite the Commission's repeated references to the 50,000 applications it received in 1992 for commercial, subscriber-based MAS licenses, Adaptive Broadband has consistently challenged the notion that this phenomenon is evidence of an extensive market for subscriber-based, commercial multiple address microwave services. Based on its sales of MAS systems to actual customers, Adaptive Broadband is absolutely convinced that the 50,000 applications were filed by speculators, who were misled by the notorious "application mills" of the time. Adaptive Broadband has opposed the use of auctions and territory licensing and has repeatedly urged the Commission to proceed with accepting MAS applications and issuing licenses to the nation's public safety and critical infrastructure companies.

The Commission Is Misreading the Balanced Budget Act of 1997

The Balanced Budget Act of 1997 extended the FCC's authority to employ auctions in the licensing process. It also eliminated the requirement that the license be for a subscriber-based service. The Act directed the FCC to conduct an auction whenever "mutually exclusive applications are accepted for any initial license or construction permit (emphasis added)." Clearly this language is broad enough to include MAS applications. The statute contains, however, one major exemption.

The exemption contained in the statute is for "public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that (1) are used

to protect the safety of life, health, or property; and (2) are not made commercially available to the public."

According to the conference report that accompanied this legislation, "the exemption from competitive bidding authority for 'public safety radio services' includes 'private internal radio services' used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public." As the Commission itself notes in Paragraph 3 of the Further Notice, and as Adaptive Broadband's sales experience attests, these entities are the traditional users of MAS systems and have always been the overwhelming majority of MAS users.

In short, Congress has given the Commission instructions to exempt from auctions applications filed by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, state and local governments, emergency road services and other entities who can show that their internal communications protect the safety of life, health or property and are not offered to the public on a commercial basis. These are "exemptions," not "exceptions;" they relate to the nature of the use and the user, not to the Commission's artificial classification of the nature of any particular frequency band.

The Commission's efforts to examine and characterize the various MAS bands according to the "current dominant use" of the bands are misguided. Consequently, the

Commission's proposals and tentative conclusions based on the results of these efforts are flawed and should not be adopted. Congress directed the Commission to examine the *applicants for initial licenses*, not previously granted licenses. If these applicants are public safety applicants (as broadly defined in the Balanced Budget Act[1]) and seek initial licenses for their internal communications, they are exempt from auctions.

Nowhere is the process followed by the Commission in its Further Notice more misguided than with respect to the 932/941 MHz band. Except for two federal government licensees, this band is vacant, so there is no current dominant use. (See Paragraph 11 of the Further Notice.) With no users to scrutinize, the Commission falls back yet again on those 50,000 bogus applications that were once filed for the band to support its conclusion that the band does not fall within the auction exemption. This is sophistry. It reflects the lengths to which the Commission will go in order to preserve its inventory of auctionable product.

The fact is, the band is available for all types of initial applicants. Employing the method used by the Commission for the other MAS bands, one cannot inspect the current dominant use of this band and conclude that this use does not qualify for the exemption. In fact, looking only at the actual --- and therefore dominant --- use of the band, one would have to conclude that, based on the current dominant use, the band does indeed qualify for the exemption.

---

[1]Here and throughout these comments, when we refer to public safety applicants, we mean the expanded definition of public safety as used on the Balanced Budget Act, and not merely the traditional public safety eligibles, such as police and fire departments.

The Commission's analysis filters out and denies the band to a particular class of initial applicants --- the very public safety applicants who have been waiting for 15 years for spectrum relief. The Commission's analysis is flawed in that it does not examine the nature of *initial applicants* and their proposed use, as mandated by Congress. It is flawed in that it examines historical usage, rather than proposed usage by new applicants. It is flawed in that it does not apply the same method of factual analysis to each band. For these reasons, the tentative conclusions reached by the Commission, especially with respect to the 932/941 Mhz band, are erroneous, arbitrary and unsupportable.

Practical Licensing Issues

At Paragraph 23 of the Further Notice, the Commission states that it does not interpret the Balanced Budget Act to mean that public safety radio service applicants can control whether or not a particular frequency is subject to the competitive bidding process, because such an interpretation would complicate the licensing process and create uncertainty among applicants. We disagree with the Commission's interpretation. Although the exemption for public safety does indeed create the practical problems which the Commission seeks to avoid, there is no getting around the plainly expressed wishes of the Congress to exempt public safety entities from the auction requirement when they seek frequencies for their internal communications. Congress did not tell the Commission to exempt certain initial applicants "but only if it will not be too difficult to implement."

The practical problems mentioned by the Commission are a concern chiefly with the initial licensing of the virtually vacant spectrum band at 932/941 MHz, since such band presents the only significant occasions where exempt and non-exempt entities might file mutually exclusive applications. In other bands, which are already heavily licensed on a site-by-site basis, it is unlikely that there will be multiple applicants for the same pair of MAS frequencies. Because the only significant source of additional MAS spectrum is the 932/941 MHz band, we shall direct our comments regarding practical licensing issues predominantly to this band.

The licensing process and service rules for the MAS bands are already in place. These rules can govern site-licensed stations in the 932/941 MHz band as well. The principal obstacle is accommodating both exempt and non-exempt initial applicants for licenses in the band, especially in the event of the filing of mutually exclusive applications.

Rather than avoiding this problem by characterizing the nature of the band and filtering out particular initial applicants as the Commission has done, Adaptive Broadband suggests the creation of two pools of frequencies in the band:

- A pool of 25 MAS channels in the 932/941 MHz band for application by public safety entities, i.e., utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, state and local governments, emergency road services and other companies that certify that these channels will be used for internal communications to protect the safety of life, health or property without being offered to the public on a commercial basis. Licensing to be on a site-by-site basis.

- A pool of 15 MAS channels in the 932/941 MHz band for licensing by auction to commercial users and licensing to federal agencies. Licensing to be on a territory basis.

After 5 years, the Commission should evaluate its licensing experience and make any

adjustments in the relative balance of these pools that appear to be appropriate.

Resolution of Mutual Exclusivity

Congress, in the 1997 Budget Act, terminated the Commission's authority to use lotteries to issue licenses in mutual exclusivity situations. This raises the question of how applications from exempt entities, that would be considered to be mutually exclusive, should be resolved[2]. This situation should be extremely rare, first, because private, exempt users in any given area are not numerous; and second, because the frequency coordination process precedes the filing of site-by-site license applications with the FCC. Nevertheless, should there be a situation where more applications are tendered to the coordinators on any given day than there are available channels, we suggest that all applications be granted if they are otherwise in order and that the applicants be required to share the channels under whatever arrangement they can privately negotiate.

Because there are two existing users in the 932/941 MHz band, site-by-site licensing in this band will require frequency coordination from the outset. All applications that are in order and that can be coordinated at their requested locations would be forwarded by the coordinators to the Commission with a recommendation for grant. As is the case today, when the channels

[2]The situation should not arise as between an applicant that is exempt from auctions and one that is not exempt. That is the reason for the creation of two pools of channels, the exempt pool being site-licensed and the non-exempt pool being territory-licensed.

available for use at a given location are exhausted, no more licenses can be coordinated or granted for systems at that location.

For any given location, the point may be reached when more applications are tendered to the coordinators than there are available channels. Whether that point is reached on the first day of licensing or a subsequent day, the procedure should be the same: all applications that reach the coordinators on the day when this situation is created will be granted the right to use the available channel or channels. For example, if two applications are filed for one remaining channel, then both applicants would be licensed to use the same channel. If ten applications are filed for three remaining channels, then these ten applicants would be given the right to share these three channels. The licensees themselves must then negotiate the terms of their sharing arrangement among themselves.

Conclusion

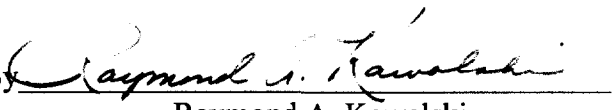
MAS channels in most parts of the country were exhausted years ago. For fifteen years, additional, vacant spectrum has been tantalizing America's public safety and critical infrastructure entities. For fifteen years, the vacant spectrum has been wasted while the Commission first decided how to parcel out the licenses and then quibbled about whether the licenses could be auctioned. Congress finally stepped in and directed that public safety and critical infrastructure entities should be able to apply for this spectrum without being subject to the auction process.

In response to what should have been a breakthrough at long last to licensing this spectrum, the Commission instead has: waited *another* two years to even commence a proceeding to implement the wishes of Congress; *frozen* the application process to prevent public safety and critical infrastructure companies from applying for any currently available licenses that might be of use; and proposed to effectively *disqualify* public safety and critical infrastructure companies from the very band which should have become available to them 15 years ago.

At some point the Commission must step back and realize that private, internal radio systems have played and continue to play an enormous role in furthering the public interest. That point is now. The one megahertz of paired spectrum in the 932/941 Mhz band is minuscule, yet the public interest benefit to be derived from making this spectrum available without auctions and without further delay to public safety and critical infrastructure companies is enormous. It is not enough to throw a sop to this community by setting aside 5 channels for police and fire departments. The public interest demands a much more reasonable allocation of channels to the broader public safety community as defined in the Balanced Budget Act, as set forth in these comments.

Respectfully submitted,

ADAPTIVE BROADBAND CORPORATION

By: 

Raymond A. Kowalski

Its Counsel

September 16, 1999

Keller and Heckman LLP
1001 G Street, NW, Suite 500W
Washington, DC 20001
202-434-4230